ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION AND IDENTIFYING PARTICULARS OF APPELLANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION AND IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA378/2016
[2017] NZCA 235

BETWEEN	W (CA378/2016) Appellant
AND	THE QUEEN Respondent

Hearing:	1 May 2017
Court:	French, Mallon and Wylie JJ
Counsel:	T Epati for Appellant K S Grau for Respondent
Judgment:	6 June 2017 at 4.00 pm

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The appeal against conviction is dismissed.

C The appeal against sentence is dismissed.

D Order prohibiting publication of name, address, occupation and identifying particulars of appellant pursuant to s 200 of the Criminal Procedure Act 2011.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] W was convicted of one charge of sexual violation by unlawful sexual connection following a jury trial in the District Court. The complainant was his partner M. It was alleged that W forced his penis into M's mouth shortly after she had been treated at hospital for injuries inflicted by him including to her mouth.

[2] The trial judge Judge Ingram sentenced W to a term of imprisonment of six years.[1] Prior to the trial, W had pleaded guilty to other offences involving physical violence against M that he had committed during the same week as the alleged sexual violation. He had been sentenced for those offences to two years and four months' imprisonment.[2] Judge Ingram directed that the sentence of six years for the sexual violation was cumulative on the other sentence, making an overall prison term of eight years and four months.

[3] W now appeals both his conviction on the charge of sexual violation and his sentence. The appeal was filed out of time. The period of delay however was short and there is a reasonable explanation. The Crown did not oppose an extension of time and it is accordingly granted.

Background

Events between 10 and 17 July 2015

[4] M and W were in a volatile on-off relationship for over two years. In January 2015 M obtained a final protection order against W. The couple reunited in early July 2015. Between 10 and 17 July 2015 W subjected M to a series of violent attacks.

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1 *R v [W]* [2016] NZDC 12295.
2 *R v [W]* [2016] NZDC 283.

[5] On 10 July W threw M on the floor and punched her face giving her a black eye. On 15 July he dragged her across gravel, threw a half empty can of drink at her head causing a four cm gash, threw her against kitchen cupboard doors with such force they broke, punched her several times including when she lay on the ground, and bit her lips with his teeth causing cuts to the inside of her mouth. He refused to allow her to leave the house to get medical help.

[6] The following day 16 July, M's sister took M to the hospital. W demanded to be present at the hospital where M received stitches for the gash to her forehead and was discharged. M wanted to stay with her sister but W threatened M. He threw M up against a house before dragging her onto a bus to travel home. He later again punched M and threatened her. He again refused to allow her to leave or eat or drink.

[7] On 17 July W assaulted M again by punching her in the face and grabbing her about the neck strangling her. M was eventually allowed out of the house and managed to contact her sister for help.

[8] The Crown alleged that in addition to the above assaults, W had also forced M to perform oral sex on him.

Pre-trial statements

[9] M made the allegation of forced oral sex in two formal statements to the police regarding the events of 10–17 July. The first was a signed written statement and the second was a video interview. M stated that on the couple's return from the hospital on 16 July, W wanted her to perform oral sex on him and that when she refused because of her sore mouth, he grabbed her head by the hair and forced her mouth onto his penis. She said she kept trying to close her mouth and pull away but he held onto her head and kept forcing his penis in. She demonstrated his body position and how he had held her head. She also claimed that at one point when she tried to use her hands to pull him off her, he grabbed her hands and pinned them under his legs. The incident ended with W punching her in the eye.

[10] M further told police that about an hour after the forced oral sex, she and W had consensual vaginal sex.

[11] According to a statement obtained by police from M's sister, M made the allegation of forced oral sex to her.[3] The allegation that W forced M to have oral sex was also recorded in a doctor's notes of her attendance on M on 17 July.

[12] When first interviewed by police, W denied any violence towards M. He later admitted to some limited violence. When police put the allegation he had forced M to have oral sex, W admitted there had been oral sex after they got back from the hospital but said it was consensual and that M had initiated it. He said she had unbuttoned his pants and put his penis in her mouth.

[13] Subsequently W pleaded guilty to three counts of injuring with intent, one count of assault with intent to injure and one count of breaching the protection order. He continued to deny the sexual violation charge.

M's evidence at trial

[14] At trial, M resiled from her pre-trial statements about the sexual violation. She said the oral sex had been consensual, and that she had lied to the police out of anger and spite. She denied telling the doctor and her sister she had been forced to have oral sex.

[15] The Judge granted the Crown's application to have M declared hostile. Her pre-trial statements were put to her. She stated she had told the truth in her evidential video about the assaults but maintained the allegations about forced oral sex were false. In cross-examination by defence counsel, she agreed that after an argument one of the ways she and W would make up was to have sex and that before the oral sex she had been kissing him. The cross-examination contains the following exchange:

> Q. And it wasn't his idea that instigated the oral sex, that was your idea wasn't it?

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[3] At trial, the sister said she could not remember M saying this to her but also stated she (the sister) was being truthful to the police when she spoke to them.

A. Yes it was.

Q. And you unbuttoned his shorts?

A. Yeah.

Q. Took those down and despite having a sore mouth you performed oral sex on him for a little while?

A. Yes I did.

Q. And when you did notice it was hurting you told him, didn't you?

A. Yeah.

Q. And you said, "Nah it's hurting, we need to stop."

A. Yeah.

Q. And he stopped?

A. Yes he did.

Q. And then you had normal sexual intercourse, didn't you?

A. Yeah.

Appeal against conviction

[16] On appeal, W's counsel Ms Epati submitted that the trial miscarried based on two distinct grounds to which we now turn.

Trial counsel's cross-examination of Detective Farrell

[17] The Crown called the police officer in charge of the case to give evidence about two meetings he had with M shortly before the trial. Detective Farrell testified that at the first meeting on 5 May 2016, M told him she wanted to drop the sexual assault charge and that she had made it up. He arranged a second meeting to take a statement from her confirming this. However, at the second meeting on 10 May, she told him her original statement was true but that if she was made to go to Court she would tell lies.

[18] This account of the meetings had been put by the prosecutor to M when she gave evidence. M said she had been trying to tell the police for some time that the sexual assault charge was not true and denied any inconsistency in her position as

between the two meetings with Detective Farrell. She denied ever telling him on 10 May that she would lie if required to come to Court and said that when asked at both meetings whether her first statement was true she had expressly stated it was only the assault part that was true.

[19] Ms Epati contended that defence trial counsel Mr Rickard-Simms should have cross-examined M about the 10 May meeting but failed to do so. In fact Mr Rickard-Simms questioned M about both the May meetings. Under cross-examination, M said she recalled telling Detective Farrell on 10 May that the statements she had made about the assault charges were correct, and then requesting to speak to a lawyer. Mr Rickard-Simms did not question M directly about the allegation she had told the detective she would lie in court.

[20] Mr Rickard-Simms also cross-examined Detective Farrell about the meetings. Mr Rickard-Simms elicited more detail about the discussions on 5 May that was favourable to W, including the fact M had told the detective her mouth was not causing her any issues on 16 July, that she had been assaulting W, and that she had been "drugged up" during the week in issue. Mr Rickard-Simms also put to the detective that the meeting on 10 May was essentially about M not wanting to make another statement without a lawyer being present. The detective agreed that was part of the conversation.

[21] Through oversight, Mr Rickard-Simms did not however directly challenge Detective Farrell's evidence that M had said on 10 May that all of her original statement was true and that she would lie in Court.

[22] On appeal, Ms Epati submitted that this "damaging piece of evidence" was pivotal, being "a complete answer" to the central question of whether M was lying in court or was lying in her original statements to police. The fact it was uncontested was relied upon by the Crown in closing and also mentioned by the Judge in his summing-up. In Ms Epati's submission, it could not be said the failure to cross-examine both M and Detective Farrell on the point would have had little or no effect on the jury in what was a marginal case. Justice had thus miscarried.

[23] We do not accept that submission. In our view, there is no real risk the error affected the outcome of the trial. We agree with the Crown that short of the officer admitting he was mistaken or confused or was lying, all of which seem extremely unlikely, cross-examination along any of those lines would not have assisted the defence, but would only have drawn further attention to adverse evidence. It would also have enabled the detective to bolster his evidence by referring to the relevant passage in his job sheet.

[24] We consider that arguments about what might have been able to be achieved by cross-examination of the detective (or further cross-examination of M) are highly speculative. Such arguments also take insufficient account of the fact M had already vehemently denied making the statements to Detective Farrell and insufficient account of the nature of the statements in question. It was not a situation where realistically there was room for misunderstanding as between M and Detective Farrell. This is a very different case from *R v Gutuama*, the case relied upon by Ms Epati.[4] In *Gutuama* trial counsel failed to appreciate the significance of comments in a job sheet and did not cross-examine on them. However, the comments in question were favourable to the defence and the possibility of fruitful cross-examination was a realistic one.

[25] We accept there was some prejudice to W in the Crown and the Judge being able to say the evidence was not challenged. However, we also note that having told the jury they were entitled to take into account the fact the evidence had not been challenged, Judge Ingram went on specifically to say:

> [41] It is, however, important for you to recognise that counsel are human and can make mistake. A failure here, such as this, may very well have been an oversight by Mr Rickard-Simms. If Detective Farrell's evidence on the point was not correct, obviously it does not become correct simply because it was not challenged. It is a matter you will need to consider and think about.

[26] Contrary to a submission made by Ms Epati, we consider this did reduce the prejudice.

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4 *R v Gutuama* CA275/01, 13 December 2001.

[27] We also do not agree with Ms Epati's characterisation of the case as marginal without the unchallenged evidence. The jury had M's original statements to the police, the examining doctor and her sister (all made closer to the time of the incident), as well as evidence of the injuries to her mouth which made it most unlikely she would have initiated oral sex. There was also the evidence of W's violent and controlling behaviour and his lies to the police.

[28] M's original statements to the police are detailed, clear and compelling. They also contain the frank admission that the vaginal sex on the same night was consensual. In light of that disclosure, the jury might well have thought it did not make sense for M to have made up the first allegation out of spite.

[29] In contrast to her original pre-trial statements, aspects of the account given by M at the trial were contradictory and implausible. She initially tried to minimise the physical violence and the extent of W's control of her. And then when asked to recount what happened when she and W had oral sex, she struggled with the detail. Despite evidence her mouth was bloodied and so sore she could only drink out of a straw, she claimed she could not remember how her mouth had felt at the hospital. The jury might reasonably have concluded that her testimony bore all the hallmarks of a woman who was lying to protect her partner and the father of her children from what was likely to be a long prison sentence were he to be found guilty.

The Judge's direction on consent

[30] Judge Ingram provided the jury with the following question trail.

> **Charge 1: Sexual violation**
>
> ***Note: On all issues the burden of proof beyond reasonable doubt lies on the Crown.***
>
> **1. Has the Crown satisfied you beyond reasonable doubt that [W] inserted his penis into [M's] mouth?**
>
> If yes, go to question 2.
>
> If no, find [W] "not guilty".
>
> **2. Has the Crown satisfied you beyond reasonable doubt that [M] did not consent to that act?**

If yes, go to question 3.

If no, find [W] "not guilty".

3. Has the Crown satisfied you beyond reasonable doubt that [W] did not believe that [M] was consenting?

Consent means true consent freely given by a person who is in a position to make a rational decision. Lack of protest or physical resistance does not, of itself, amount to consent. There are some circumstances where allowing sexual activity does not amount to consent, including the application of force to the complainant or the threat or fear of such application of force;

If yes, find [W] "guilty".

If no, go to question 4.

4. Has the Crown satisfied you beyond reasonable doubt that [W] had no reasonable grounds to believe that [M] was consenting?

If yes, find [W] "guilty".

If no, find [W] "not guilty".

[31] The Judge explained to the jury that the question trail was designed to assist them in addressing the factual issues they needed to determine and that answers to the questions posed would lead them to a decision on the charge. He then went through each of the questions, noting that the definition of consent would have been more appropriately placed under question 2. The Judge then made the following statements which on appeal are said to have given rise to a miscarriage of justice.

> [24] The next question is, "Has the Crown satisfied you beyond reasonable doubt that he believed [M] was consenting?"[5] If the answer is "yes" you will find him guilty. If the answer is "no" you will go onto question 4. I have set out the definition of consent under that question. I probably should have set it out under question 2, but as long as you have that is what really matters.
>
> …
>
> [28] I point out that question 2 is a question about [M's] state of mind. Questions 3 and 4 are questions about [W's] state of mind and the reasonableness of his belief. Question 4 is particular in relation to the reasonableness of belief. That is not a question of what [W] thinks is reasonable. It is a question of what you think is reasonable. You decide whether or not it was reasonable. It is not a matter for [W] to say whether or

[5] The first sentence of [24] is not a correct statement of the law. The Crown was required to prove W did *not* believe M was consenting. However the Judge was reading out to the jury what the question trail said and the question was formulated correctly. Either it was a slip of the tongue or a typo in the transcript. Either way we are satisfied that nothing turns on it.

> not it was reasonable. You make the decision about that aspect of matters. It is what we call an objective test, it is your assessment, rather than a subjective test of what [W] assessed as being reasonable.

[32] Ms Epati submitted that these directions on the element of absence of reasonable belief in consent were inadequate. She contended the direction was too brief, confusing and, in so far as it reversed the onus of proof, it was wrong.[6]

[33] We accept that arguably the Judge could have said more about belief in consent. However, we are satisfied that what was said was correct and further that in the circumstances of this case there is no reason to suppose the jury did not understand what it was they were required to do.

[34] At the very beginning of the trial, the Judge gave the jury a preliminary memorandum so they would have it "available for reference during the trial". He read through it with them. The memorandum began by stating that the Judge thought it would be helpful to set out for the jury the basic onus of proof and the "core legal elements of the charges which the Crown will have to prove". After explaining the onus and standard of proof, the memorandum then correctly stated as separate elements that the complainant did not consent and that the defendant did not believe on reasonable grounds she was consenting.

[35] In her closing address, the prosecutor concluded by telling the jury they were entitled to find W guilty if they were sure the oral sex "was against her will and the defendant knew it".

[36] Similarly in his closing, defence counsel told the jury there were two sides to consent — whether or not there was actual consent and whether or not W believed M was consenting. They needed, he said, to be sure W could not have had any belief on reasonable grounds that she was consenting. He enjoined the jury to consider what did W think — would it have been reasonable in the circumstances for him to believe that she was consenting — when she was his partner, the mother of his children, a person he knew as well as anyone, when they had been kissing leading up to the oral sex and the vaginal sex. His final remarks to the jury included a

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[6] Ms Epati also drew our attention to the error in the opening sentence of [24] as transcribed but appropriately did not place any weight on that aspect.

submission that the Crown had not proved beyond reasonable doubt that M had not consented or that W did not believe she was consenting.

[37] As for the Judge's summing-up, we do not agree he suggested that W bore some onus of proof when it came to belief in consent by telling them it was "not a question of what [W] thinks" and "not a matter for [W] to say". The question trail broke the issue of belief in consent into two parts — the existence of a belief and secondly the reasonableness of that belief. It is quite clear the comments in question were directed at the second of these, not the first, and that all the Judge was saying was that reasonableness was to be assessed on an objective basis. We note too that the question trail was headed with an instruction that *on all issues* the burden of proof beyond reasonable doubt rested on the Crown.

[38] We also do not agree with a further submission made by Ms Epati that the "jury were essentially told not to consider what the appellant was thinking at the time". The Judge did not say that and as already mentioned the existence of the belief and its reasonableness were treated as separate components. Further, later in the summing-up, the Judge reiterated the defence point that various matters were all "good reasons for [W] to reasonably believe that [M] was consenting". The Judge also reminded the jury that the defence said there was nothing W had said or done that indicated he knew the sex was not consensual.

[39] Criticisms of the brevity of the direction on reasonable belief in consent also need to be tempered by consideration of the fact that the primary focus of this trial was actual consent, not the possible existence of a mistaken but reasonable belief in consent.[7] If accepted, M's account of the incident in her original statements left no room for any suggestion W could reasonably have believed M was actually consenting. The competing version of events — M's account at trial and W's account in his police interview — was also all about actual consent. M testified she had done it all to him — she instigated it, kissed him, unbuttoned his trousers, ripped off his clothes and placed her mouth on his penis. W stopped when she asked him to

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[7] The only possible evidential foundation for the existence of an honest but mistaken belief was the evidence of Detective Farrell that on 5 May 2015 when asked whether she had wanted oral sex, M replied "I sort of wanted it but sort of didn't."

stop. That it was all about actual consent was reflected in defence counsel's cross-examination of M.

Conclusion

[40] We are satisfied that neither ground of appeal whether viewed individually or collectively is sustainable. The appeal against conviction is dismissed.

Appeal against sentence

[41] Judge Ingram adopted a starting point of seven years' imprisonment which he then discounted by 12 months on account of W's age (19 years) and willingness to engage in rehabilitative treatment.[8] The resulting six-year term was then imposed cumulatively on W's existing prison sentence of two years and four months.

[42] On appeal, Ms Epati contended the effective overall sentence for the offending against M of eight years and four months' imprisonment was manifestly excessive in all the circumstances. In particular, she submitted that the starting point was too high and the youth discount inadequate, especially having regard to the fact that W did not get the benefit of a youth discount at the earlier sentencing for the violence offences.

[43] In adopting a starting point of seven years, Judge Ingram identified the aggravating features of the offending as being the degree of violence, the detention, M's vulnerability and the fact W was subject to a sentence of supervision at the time as well as the protection order.[9] Those factors the Judge considered placed the offending within band 2 of *R v AM (CA27/2009)*, which has a range of seven to 13 years.[10]

[44] Ms Epati argued that relying on the additional features of violence and sustained detention of M (beyond that inherent in the offence itself) amounted to double counting, because those features had already been factored into the term of

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8 *R v [W]*, above n 1, at [22]–[24].

9 These last two matters are more correctly seen as aggravating factors relating to the offender personally but nothing turns on that.

10 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [90].

two years and four months for the violent offending. In her submission, the Judge should either have reduced the starting point to the bottom of band one of *AM* or made an adjustment for totality.

[45] This Court in *AM* described band two as covering offending involving a vulnerable victim or some additional violence.[11] It is not double counting to take into account the particular cruelty and callousness of forcing a penis into M's mouth knowing it was injured. Of itself that would be sufficient to place this case in band two. It is not the fact that W inflicted the injury to the mouth — for which he had already been sentenced — that is aggravating but the fact that he targeted an already injured mouth.

[46] As regards the youth discount of a year, we accept that some judges might have given a greater discount. However, we consider the size of discount given by Judge Ingram was open to him. This was not impulsive offending. W is not a first time offender and his offending has escalated. The pre-sentence report assessed him to be at a high risk of re-offending.

[47] Ultimately of course, as both counsel acknowledged, our primary focus must be the end sentence of eight years and four months' imprisonment and whether that was manifestly excessive for the totality of the offending.

[48] We consider the end sentence was within range. This was in our view very serious offending involving as it did detention of a vulnerable victim and a sustained period of significant violence including strangling and sexual violation, inflicted by a person already serving a sentence of supervision imposed for an assault against the same victim.

[49] The appeal against sentence is accordingly dismissed.

Outcome

[50] The application for an extension of time is granted.

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[11] At [98].

[51] The appeal against conviction is dismissed.

[52] The appeal against sentence is dismissed.

[53] An order is made suppressing the publication of name, address, occupation and identifying particulars of the appellant pursuant to s 200 of the Criminal Procedure Act 2011.

Solicitors:
Rishworth Wall & Mathieson, Gisborne for Appellant
Crown Law Office, Wellington for Respondent